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February 20, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Filing Date: November 26, 2008

Case Number: TSO-0693

This Decision considers the eligibility of XXXXX (the individual) to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As I explain below, the Department of Energy (DOE) should not grant the individual an access authorization.

I. Background

In August 2007, the individual began working for the DOE, completed a Questionnaire for National Security Positions (QNSP), and applied for an access authorization. DOE Exh. 6 (QNSP, Aug. 13, 2007); DOE Exh. 5 (Clearance Request, Aug. 16, 2007). In October 2007, the individual disclosed to an Office of Personnel Management (OPM) investigator that he falsified several QNSP responses. DOE Exh. 8 (OPM Report of Investigation, Nov. 5, 2007); *see also* Tr. at 41-42. In August 2008, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) to discuss the individual's QNSP responses. DOE Exh. 7 (PSI Transcript, Aug. 4, 2008).

The LSO denied the individual's request for an access authorization and issued him a Notification Letter that cited two security concerns. DOE Exh. 1 (Notification Letter, Sept. 2, 2008). The LSO alleged that the individual "has deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire." *Id.* (quoting 10 C.F.R. § 710.8(f) (Criterion F)). The LSO stated that the bases for its Criterion F security concern are:

- 1) In August 2007, the individual signed a QNSP certifying that in the last seven years he had not left a job under unfavorable circumstances. During the August 2008 PSI, the individual admitted that in November 2004 he had been forced to resign from his retail position for aiding in the theft of merchandise. He stated

that he omitted his job resignation in fear that he may not be hired or granted an access authorization;

- 2) In the August 2007 QNSP, the individual certified that in the last seven years he had not illegally used controlled substances. During the August 2008 PSI, the individual admitted that from 2002 to 2004 he used marijuana. He stated that he omitted his marijuana use in fear that he may not be hired or granted an access authorization; and
- 3) In the August 2007 QNSP, the individual certified that he did not have financial delinquencies. During the August 2008 PSI, he admitted having two delinquent accounts that he failed to report, despite being aware of them.

DOE Exh. 1 (Notification Letter, Sept. 2, 2008).

The LSO also alleged that the individual “has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of national security.” *Id.* (quoting 10 C.F.R. § 710.8(l) (Criterion L)). The LSO stated that the bases for its Criterion L security concern are:

- 1) The individual admitted that in 2004 he was forced to resign from his retail position for aiding in the theft of merchandise;
- 2) The individual admitted that he intentionally omitted his resignation from his August 2007 QNSP;
- 3) The individual admitted that he intentionally omitted his illegal drug use from his August 2007 QNSP; and
- 4) The individual admitted that he omitted his financial delinquencies from his August 2007 QNSP, despite being aware of them.

DOE Exh. 1 (Notification Letter, Sept. 2, 2008).

The individual requested a hearing to respond to the LSO’s security concerns, and I conducted the hearing on January 13, 2009. The individual was represented by an attorney. The individual testified and called the following witnesses: his wife, father, mother in-law, sister in-law, landlord, current supervisor, and former supervisor. The DOE counsel did not call a witness.

II. Summary of Hearing Testimony

A. The Individual

In 2001, the individual graduated from high school. Tr. at 17.

In 2004, the individual started a sales associate job at a retailer where his cousin also worked. *Id.* at 18, 22, 25. The individual testified that while they were in a back room, the individual's cousin jockeyed merchandise from a locked cage and asked the individual "if anybody was coming." *Id.* at 25-26, 28. The individual "looked out the door" and "told him no." *Id.* at 29. The individual realized that he was stealing when he "kind of tucked [the merchandise] in his pocket." *Id.* at 51. (The individual didn't know that his cousin had previously stolen merchandise. *See id.* at 27, 51.)

The retailer recorded the theft with a hidden camera. *Id.* at 29. The individual's supervisor confronted the individual and the individual told him that his cousin was stealing. *Id.* at 30-31. The individual's supervisor believed that the individual's cousin duped the individual into helping him steal; the individual's supervisor did not believe that the individual was involved. *Id.* at 55-56. The individual's supervisor allowed the individual to resign and told him that he would give him a positive reference. *Id.* at 31.

In early 2006, the individual took a job at a local center for troubled youth, where he worked for one and a half years. *Id.* at 20, 23, 62, 132. In August 2007, he began working for the DOE and completed a QNSP. *Id.* at 17; *see also* DOE Exh. 6 (QNSP, Aug. 13, 2007).

In October 2007, the individual disclosed to an OPM investigator that he falsified three QNSP responses. *See* Tr. at 41-42. Contrary to his QNSP responses, the individual admitted that (i) within the last seven years he had left a job under unfavorable circumstances; (ii) within the last seven years he had used marijuana; and (iii) he has two delinquent cell phone accounts. *See id.* at 25, 33, 38-40.

The individual testified that his decision not to disclose his job dismissal stems from a conversation with his father, who helped him complete his QNSP. His father told him that since he "pretty much quit on [his] own," then it would be "okay" to state that he had not left a job under unfavorable circumstances. *Id.* at 32. The individual now acknowledges that he "should have" disclosed his resignation. *Id.* at 33.

The individual's decision not to disclose his marijuana use also stemmed from his conversation with his father, who advised him to "put no." *Id.* at 45. The individual thought that his father was telling him that if he disclosed his marijuana use he would "have a bad chance of getting on with [the DOE]." *Id.* at 46. He now understands that since his father did not know that he had used marijuana, his father thought that he should state that he had not. When he did so, the individual knew that he was providing a false response. *Id.*

The individual did not disclose his delinquent cell phone accounts because he did not realize that the QNSP was asking about them. *See id.* at 34. Rather, because the individual never had other credit, he “thought . . . [the QNSP was] talking about . . . foreclosures and repos and stuff like that.” *Id.* When the OPM investigator asked the individual if he had any delinquencies, he acknowledged his cell phone accounts. *Id.* at 34-36.

The individual realizes that, “[I]f you do wrong things, [they] will catch up with you.” *Id.* at 54. He “regret[s]” falsifying the QNSP, and he is “taking responsibility for what happened.” *Id.* at 59, 133. Since 2004, the individual has “come a long way . . . starting a family and trying to do everything right.” *Id.* at 49. He is “just trying to live right.” *Id.* He is also “sticking with positive people.” *Id.* at 53. Since moving back to the area, he has been “going to church.” *Id.* at 54.

B. The Individual’s Wife

The individual and his wife have been together for nine years. *Id.* at 103. Their child is nearly three years old. *Id.* at 105. They attend church. *Id.* at 109.

The individual’s wife testified that he “was upset with himself” when the LSO raised questions about his honesty. *Id.* at 105.

C. The Individual’s Father

The individual’s father testified that he held access authorizations for more than thirty years, in the military and as a DOE contractor. *See id.* at 114.

The individual’s father helped the individual complete his QNSP. *Id.* at 116. Regarding his job dismissal from the retailer, the individual told his father that “unfortunately, he was involved” in the theft. *Id.* at 117. Yet, the individual told his father that his supervisor said that he’d provide him a “favorable reference.” *Id.* at 118. Therefore, his father advised him to indicate on the QNSP that he had not left a job under unfavorable circumstances. *See id.* The individual’s father testified that he and the individual had “no intent to try to deceive anyone.” *Id.* at 119.

Regarding the individual’s marijuana use, when the individual’s father advised the individual to indicate on his QNSP that he had not used marijuana, he was unaware that in fact the individual had done so. *Id.* at 119-121. He said, “If I had known that, I would have told him to put it down there.” *Id.* at 120.

Growing up, the individual had been “honest and forthright.” *Id.* at 125.

D. The Individual's Mother In-Law

The individual's mother in-law testified that she trusted the individual to live in her house, help pay expenses, and contribute to the childcare. *Id.* at 94. She remarked, "[W]hat he says is true, and I believe him." *Id.* at 95. For as long as she has known the individual, he has attended church, where he participates in a men's class. *Id.* at 97, 101.

E. The Individual's Sister In-Law

The individual's sister in-law has known the individual for nine years. *Id.* at 87. She testified that she trusts him with her kids. *Id.* at 88. He strives to be a good role model and a good father. *Id.* at 90. She sees no reason to question his honesty. *Id.* at 89.

F. The Individual's Landlord

The individual's landlord testified that she has known the individual since he was in middle school. *Id.* at 75. She also spends about an hour a day with him as part of their work carpool. *Id.* at 77-78. She believes that "he's a good kid" – after his girlfriend became pregnant he married her and became "a good husband and . . . father." *Id.* at 78-79. The individual and his wife have lived in the landlord's rental property for six months, and they have been "real good tenants." *Id.* at 77. She believes that he is "honest and trustworthy." *Id.* at 81.

G. The Individual's Current Supervisor

The individual's current supervisor testified that he has supervised the individual since August 2007. *Id.* at 10. He rates him "very high." *Id.* He is an honest, reliable employee that leads by example. *Id.* at 13-15.

H. The Individual's Former Supervisor

The individual's former supervisor testified that she worked with him at the center for troubled youth. *Id.* at 62. The individual was a positive role model for children with troubled upbringings. *Id.* at 64. He's a leader who would have said "no" if "his peers" wanted to do something that "wasn't right." *Id.* at 70.

III. Legal Standard

In order to grant or restore an individual's access authorization, the Hearing Officer must find that the grant or restoration "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. §§ 710.7(a), 710.27(a); *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988). In order for the Hearing Officer to make this finding, the individual must resolve the security concerns that the

DOE identifies in its Notification Letter. *See, e.g., Personnel Security Hearing*, Case No. TSO-0586 (2008).¹

The individual must resolve the DOE's security concerns by presenting evidence to rebut, refute, explain, extenuate, or mitigate the allegations supporting the DOE's security concerns. *See, e.g., Personnel Security Hearing*, Case No. TSO-0598 (2008).

The individual has the burden to resolve the DOE's security concerns because once the DOE finds a security concern, "[T]here is a strong presumption against granting a[n access authorization]." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). "[D]eterminations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see also* 10 C.F.R. § 710.7(a) ("Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security.").

The Hearing Officer considers "all relevant information, favorable and unfavorable," to issue a decision that is "a comprehensive, common-sense judgment." 10 C.F.R. § 710.7(a). The Hearing Officer shall consider the following factors: witness demeanor and credibility; the authenticity and accuracy of documentary evidence; the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledge and participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavior changes; the motivation of the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *Id.* at §§ 710.7(c), 710.27(a)-(b).

IV. Analysis

A. Criterion L

The allegation supporting the LSO's Criterion L security concern is that in 2004 the individual was forced to resign from his retail position for helping his cousin steal merchandise.² At the hearing, the individual argued that he was not involved in the theft – he testified that he did not know that his cousin was stealing before his cousin asked him to look out and that he realized his cousin was stealing when he put the merchandise

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

² As a basis for its Criterion L security concern, the LSO also included the three QNSP omissions that form the basis for its Criterion F security concern. I discuss the omissions in my analysis for Criterion F.

In my analysis I address Criterion L and the individual's employment resignation before Criterion F and the individual's omissions because (i) describing the resignation establishes the factual context for his employment-related QNSP omission; and (ii) addressing the resignation is a presupposition to addressing his employment-related QNSP omission; if the individual left his job under favorable circumstances, he could not have falsified his QNSP by omitting his resignation.

into his pocket. The individual also testified that his supervisor believed that his cousin duped him into participating in the theft and that he would give him a positive reference. I find his argument unpersuasive.

First, I am not persuaded that the individual testified truthfully at the hearing because his PSI testimony contradicts his hearing testimony. For example, contrary to the individual's hearing testimony, at the PSI he testified that he was aware of his cousin's thefts before his cousin asked him to act as a lookout, and that the individual knew what his cousin asked him to do:

[Investigator]: [G]o ahead and tell me what happened with your termination from the [retailer].

[Individual]: [A]fter a month . . . I found out that [my cousin] was taking [merchandise].

. . .

[Individual]: [H]e had already taken some and then there was a time when we went in the backroom

. . .

[Individual]: And then I kinda played . . . lookout for him because . . . it was either turn him in or get my cousin in trouble. [A]t the time I thought I was [looking out] this time, but he would have to stop.

[Investigator]: [H]ow long did you know about [your cousin's stealing] before this incident?

[Individual]: [P]robably about a week.

. . .

[Investigator]: Were you aware that you were breaking company policies and procedures?

[Individual]: Yes.

DOE Exh. 7, at 46-47, 52 (PSI Transcript, Aug. 4, 2008).³

Further, at the PSI, the individual testified that he told his supervisor in writing that he participated in the theft, and that his supervisor asked him to cover part of the cost of the missing merchandise. *Id.* at 49-50. The individual's written statement and restitution are consistent with the individual's PSI testimony that he was involved and the fact that the

³ I did not analyze the OPM Report of Investigation as I did the PSI, because the OPM Report of Investigation does not contain a transcript of the investigator's interview(s) with the individual.

individual's supervisor asked him to resign, after watching a video that apparently showed that he was involved. Those actions are not consistent with the individual's hearing testimony that his supervisor believed that he was duped.

Second, the individual did not present evidence to corroborate his hearing testimony. For example, he did not present evidence from the retailer's management to support his story that he was not involved in the theft and that his supervisor believed that he was duped and would provide him a positive reference.

Third, the individual's participation in his cousin's scheme exhibits a potential to succumb to pressure, coercion, and exploitation.

B. Criterion F

The allegations supporting the LSO's Criterion F security concern are that he falsified his QNSP by omitting that (i) within the last seven years he had been terminated from a job under unfavorable circumstances; (ii) within the last seven years he had used marijuana; and (iii) he has two delinquent cell phone accounts. I find the individual's attempts to mitigate the allegations unpersuasive.

The individual testified that he omitted his job dismissal upon his father's advice. His father told him that since he "pretty much quit on [his] own," then it would be "okay" to state that he had not left a job under unfavorable circumstances. As discussed above, the individual's supervisor asked him to resign after the individual admitted that he was involved with a theft – unfavorable circumstances by any definition. The individual knew he was providing a false response; he did not believe, based on his father's advice, that he was providing a truthful response. Therefore, following his father's misplaced advice does not mitigate the allegation.

The individual's argument regarding his marijuana use is similar and fails for similar reasons. The individual testified that he omitted his marijuana use because his father, who didn't know that the individual had used marijuana, advised him to respond that he had not. The individual may have quickly followed his father's guidance because his father held access authorizations for many years, and was ostensibly familiar with the QNSP. Yet, the individual knew that he was providing a false response; he did not believe, based on his father's advice, that he was providing a truthful response. Therefore, following his father's misplaced advice does not mitigate the allegation.

The individual testified that he omitted his financial delinquencies out of his inexperience with credit. He believed that the QNSP asked about foreclosures and repossessions – not cell phones. (The plain text of the question does not distinguish between cell phone debts and other debts. *See* DOE Exh. 6, at 31 (QNSP, Aug. 13, 2007)).

I am not persuaded that the individual testified truthfully because his PSI testimony does not support his hearing testimony. At the PSI, the individual did tell the investigator that he "kind of misinterpreted" the question. DOE Exh. 7, at 23 (PSI Transcript, Aug. 4,

2008). Yet, when the investigator pressed the individual for greater detail, including his apparent statement to the OPM investigator that he “probably” omitted it intentionally, he said, “I’m really – I’m really not sure. I’m not sure. I’m not really sure what I did or didn’t do.” *Id.*

Further, the individual’s pattern of dishonesty diminishes his credibility. He was dishonest in 2004 (aiding in the theft of merchandise), 2007 (falsifying his QNSP), and either August 2008 (testifying at the PSI) or January 2009 (testifying at the hearing).

C. Rehabilitation and Reformation

To show rehabilitation and reformation from the LSO’s Criterion L and F security concerns, the individual testified that he has taken responsibility for falsifying his QNSP,⁴ and that since starting a family, he has been “trying to do everything right.” He also offered testimony from his family and current and former supervisors. They know him as an honest, church-going young man, who has been a role model for disadvantaged youth.

The individual’s efforts to show rehabilitation and reformation are not persuasive, because his pattern of dishonesty continued through his period of personal growth, which was also the period that his witnesses described.

V. Conclusion

For the above reasons, I find that the individual has not resolved the LSO’s Criterion L and F security concerns. Therefore, I find that the DOE should not grant the individual an access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

David M. Petrush
Hearing Officer
Office of Hearings and Appeals

Date: February 20, 2009

⁴ At the hearing, the individual indicated that he self-disclosed his QNSP falsifications to the OPM investigator. Tr. at 42. This point may tend to mitigate the allegation that he falsified his QNSP. However, at the PSI, the individual said that he “reported some of the information” to the OPM investigator because “[his] wife . . . told them about it.” DOE Exh. 7, at 43 (PSI Transcript, Aug. 4, 2008). Because the record does not show which information the individual self-disclosed, if any, and which information the individual’s wife disclosed, I did not consider the individual’s testimony indicating that he self-disclosed his QNSP falsifications.